

as well as through such means as satellite and translator stations.<sup>87</sup> In designating DMAs and compiling DMA-based ratings of television programs, Nielsen Media Research, a TV audience measuring service, collects viewing data from diaries placed in television households four times a year. Nielsen assigns counties to DMAs annually on the basis of television audience viewership as recorded in those diaries.<sup>88</sup> Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA.<sup>89</sup> Nielsen uses its DMA viewing data to compile DMA-based audience ratings for television programs. These data are used by television stations in deciding which programming should be aired, and by advertisers and stations in negotiating advertising rates.<sup>90</sup>

49. The Commission traditionally has employed DMAs or a similar geographic measure in other rules. Such a geographic measure is the Area of Dominant Influence ("ADI"), used by the Arbitron Company to define a television station's geographic market according to audience viewing patterns. In the past, we have used ADIs for purposes of calculating an entity's national television audience reach under our national television ownership rule. In the *National TV Ownership Report and Order* we are issuing today, we are adopting our proposal to use DMAs instead of ADIs in calculating national audience reach because Arbitron stopped updating its ADI market data in 1993. For the same reason, the Commission is now using DMAs rather than ADIs to define the market within which a broadcast television station is entitled to cable must-carry or retransmission consent.<sup>91</sup> Commercial market measurements such as DMAs are presently used by the Commission to define markets in other contexts as well, e.g., waivers of the one-to-a-market rule in the top 25 television markets.<sup>92</sup>

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<sup>87</sup> For example, Salt Lake City television stations are located in the northeast corner of the state of Utah. However, because of extensive use of microwave and translators, the Salt Lake City DMA encompasses the entire state of Utah and portions of other states.

<sup>88</sup> See *Nielsen Station Index, NSI Reference Supplement 1994-1995*, at 1.

<sup>89</sup> See *TV Ownership Further Notice*, 10 FCC Rcd at 3540.

<sup>90</sup> The economic studies submitted by Economists Inc. and NERA in response to the *TV Ownership Further Notice* also employed DMAs as the relevant geographic market in local advertising and in delivered video programming markets. See *Economists Inc. Study*, *supra* note 60, at 14, 29-32 and Appendices B and F; *NERA Study*, *supra* note 59, at 2-3. See also Sumanth Addanki, Phillip A. Beutel, and Howard P. Kitt, NERA, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule* (filed on behalf of the Local Station Ownership Coalition), May 17, 1995, at Tab K.

<sup>91</sup> *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations*, CS Docket No. 95-178, 11 FCC Rcd 6201 (1996). We have shifted our reliance on ADIs to DMAs in other contexts as well. See, e.g., *Brisette Broadcasting* 11 FCC Rcd 6319 (1996) (temporary waiver of the duopoly rule); *Media Communications Partners L.P.*, 10 FCC Rcd 8116, 8116 note 3 (1995) (waiver of the one-to-a-market rule).

<sup>92</sup> 47 C.F.R. § 73.3555 Note 7.

50. We recognize that we proposed in the *Second Further Notice* to supplement the DMA test with a Grade A contour standard to prohibit common ownership of stations with Grade A signal contour overlap even when they are in separate DMAs. However, after considering the comments in response to this proposal, we believe a "DMA-only" test is more appropriate. Although a station may attract some viewers who live outside its designated DMA, the preponderance of its audience will reside within its DMA. As CBS noted in its comments, local advertisers use DMA-based ratings to make their purchases of advertising time on local television stations, television networks generally have only one affiliate in each DMA, and stations target their programming to viewers inside the DMA because these are the viewers that advertisers pay to reach.<sup>93</sup> The record also indicates that there are a fair number of stations that lie in different DMAs and serve wholly different markets even though they may have slightly overlapping Grade A contours.<sup>94</sup> In addition, a DMA-only standard is more straightforward and easy to apply in terms of administering the rule. We consequently will not adopt a Grade A component in our new definition of the geographic scope of the duopoly rule.

51. This new definition will generally be less restrictive than the current Grade B signal contour test. There may be some situations, however, in which this is not the case, particularly in some geographically large DMAs west of the Mississippi River. In these situations, the DMA may be large enough that two stations situated in the DMA do not have overlapping Grade B contours. Common ownership of the two stations would be permitted under the existing rule but not under a strict application of the new DMA standard.

52. In the *Second Further Notice*, we noted our belief that there are currently few stations within the same DMA that could be commonly owned under the existing Grade B signal contour standard that are not already jointly owned. We sought comment on whether we should, if we adopted a DMA/Grade A rule, grandfather existing joint ownership combinations that conform to our current Grade B test. We also sought comment on an alternative approach of adopting a two-tiered rule under which we would permit common ownership both under the new test using DMAs and in situations where there is no Grade B overlap. Commenters addressing this issue agreed with our proposal to adopt a two-tiered rule that would permit same-DMA stations with no Grade B overlap to combine.<sup>95</sup>

53. It is our intention in this proceeding to relax the duopoly rule consistent with our competition and diversity objectives. It is not our intention to restrict combinations that would be permitted under our present Grade B signal contour test. To avoid this result, we will continue to permit common ownership of television stations in the same DMA where there is no Grade B overlap between

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<sup>93</sup> See CBS Comments at 39-41. CBS also noted that it grants network non-duplication protection to its affiliates only for that portion of the zone permitted by the Commission's rules that falls within the station's DMA.

<sup>94</sup> See Letter of Kurt A. Wimmer, Counsel to Benedek Broadcasting, to Magalie Roman Salas, FCC Secretary, May 21, 1999.

<sup>95</sup> See ABC Comments at 3; CBS Comments at 43; Gannett Comments at 2-3, 7-8; GCC Comments at 3; Kentuckiana Comments at 4-5.

those stations.<sup>96</sup> Although such stations may compete to some extent for viewers and advertisers, we believe any harm to diversity and competition from permitting such combinations will be minimal and we wish to avoid instances in which application of our new rule would be more restrictive than our current duopoly rule. In addition, this approach avoids disrupting current ownership arrangements involving stations in the same DMA with no Grade B overlap.<sup>97</sup>

#### B. Permitting Television Duopolies in the Same Local Market

54. Background. In both the *TV Ownership Further Notice* and the *Second Further Notice*, we invited comment on whether, in certain situations, we should allow entities to acquire more than one television station in the same geographic market. We sought comment both on exceptions to our "one-station" local ownership rule, including the exception currently provided in our rules for television satellite stations, as well as on a number of possible waiver criteria. In the *Second Further Notice*, we outlined five specific waiver criteria for evaluation: (1) combinations involving at least one UHF station; (2) combinations involving a "failed" station; (3) applications to acquire vacant or new channel allotments; (4) combinations involving stations with a small market share or where a minimum number of voices would remain post-merger; and (5) showings of significant public interest benefits that would result from the merger. In so doing, we requested evidence of the projected benefits of television duopolies, as well as evidence regarding the relationship between ownership concentration and diversity.

55. Comments. Most broadcasters supported permitting same-market duopolies in some form, arguing that common ownership can produce significant efficiencies and public interest benefits. Views differed regarding the extent to which mergers should be permitted and whether they should be allowed by exception to the rule, presumptive waiver, or case-by-case waiver. Many commenters favored combinations in which at least one of the parties is a UHF station.<sup>98</sup> Some advocated UHF/UHF combinations only, while others would also permit a UHF to combine with a VHF station.<sup>99</sup> A number of commenters also supported permitting VHF/VHF combinations in Hawaii, Alaska, or Puerto Rico, and

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<sup>96</sup> The Commission's policy has been to issue waivers of the television duopoly rule upon application showing mergers between television stations with *de minimis* Grade B contour overlap, *i.e.*, an area of overlap that encompasses less than one percent of the area and population of the Grade B contour of each station. *See, e.g., WNNE Licensee, Inc. et al.*, 13 FCC Rcd 12677 (1998); *Hubbard Broadcasting Inc.*, 2 FCC Rcd 7374 (1987). This policy will continue under the new rules.

<sup>97</sup> Our decision to permit same DMA/no Grade B overlap combinations by rule moots the need to adopt a provision grandfathering such existing ownership combinations. Under our new rule, as long as the same DMA/no Grade B overlap test is met, there is no restriction on the transfer of such combinations or the creation of new combinations.

<sup>98</sup> *See, e.g.,* ALTV Comments at 24-29; A.K. Media Comments at ii; Granite Comments at 3-5; HSN Comments at 9-12.

<sup>99</sup> Kentuckiana opposed a blanket exception to the duopoly rule for VHF/UHF or UHF/UHF combinations, but supported a failed station waiver that would answer the needs of struggling UHF stations. *See* Kentuckiana. Comments at 5.

in circumstances involving a failed station or vacant allotment.<sup>100</sup>

56. A number of other commenters opposed television duopolies on the ground they would threaten competition and diversity in local markets. Bahakel Communications ("Bahakel") and Centennial Communications, Inc. ("Centennial") expressed concern that combinations of same-market stations would increase the already considerable disadvantages faced by independently-owned stations in competing against group-owned stations in purchasing programming.<sup>101</sup> Post-Newsweek Stations, Inc. generally opposes same-market duopolies because of the dangers to competition and diversity, but would permit waivers in the case of a failed station or unused frequency.<sup>102</sup> MAP *et al.* expressed the view that while same-market duopolies may increase program diversity, they threaten viewpoint diversity, which is a more fundamental concern.<sup>103</sup> BET and AWRT express concern that relaxation of the television ownership rules could raise the barriers to entry for women and minorities in the broadcasting industry.<sup>104</sup>

57. Costs and Benefits of Broadcast TV Station Duopolies. We believe that the demonstrated benefits of same-market television station combinations support allowing the formation of such combinations in certain cases where competition and diversity will not be unduly diminished. The record in this proceeding shows that there are significant efficiencies inherent in joint ownership and operation of television stations in the same market, including efficiencies related to the co-location and sharing of studio and office facilities, the sharing of administrative and technical staff, and efficiencies in advertising and news gathering.<sup>105</sup> These efficiencies can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station.<sup>106</sup> In markets with many separate television licensees, the public interest benefits of common ownership can outweigh any cost to diversity and competition of permitting combinations.

58. While we conclude that the public interest would be served by permitting television duopolies in certain circumstances, we are not eliminating or relaxing the rule to the extent a number of

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<sup>100</sup> See, e.g., LSOC Comments at 79-80; Malrite Comments at 14; Pappas Comments at 7-9; Telemundo Comments at 2. Telemundo also advocated that the Commission permit combinations involving at least one Spanish-language station in order to promote and preserve Spanish language programming.

<sup>101</sup> See Bahakel Comments at 1-2; Centennial Comments at 6-7.

<sup>102</sup> See Post-Newsweek Comments at 5-6.

<sup>103</sup> See MAP *et al.* Comments at 8-11.

<sup>104</sup> See BET Comments at 2; AWRT Comments at 1-2. AWRT supports establishment of waiver criteria for the ownership rules that would be based on a station owner's incubation of women or minority-owned stations.

<sup>105</sup> See *supra* ¶ 34.

<sup>106</sup> See *supra* ¶ 36.

commenters advocate given the important diversity and competition issues at stake. Television broadcasting plays a very special role in our society. It is the primary source of news and information, as well as video entertainment to most Americans,<sup>107</sup> and we must continue to ensure that the broadcast television industry has a diverse and competitive ownership structure. Moreover, as discussed above, because the communications industry is undergoing rapid change and increasing consolidation, significant yet measured relaxation of the television duopoly rule is appropriate to allow us to monitor the results of these sweeping changes.

59. In light of these considerations, we have decided to adopt a modification to our duopoly rule, and three waiver tests, that are targeted to promote the public interest without appreciable harm to our competition and diversity goals. In particular, as described below, we will modify the TV duopoly rule to allow common ownership of two stations in the same DMA, if eight independently owned and operating commercial and noncommercial television stations will remain in the DMA post-merger, and at least one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. In addition, we will presume that a waiver of the rule is in the public interest if the applicant satisfies a "failed" or "failing" station test, or involves the construction of an "unbuilt" station. We will monitor the impact that our new rules and waiver policies have on our competition and diversity goals and adjust them as appropriate, as part of future biennial reviews of our ownership rules under the 1996 Act.

**1. Modification of the Rule: Eight Voice/Top Four-Ranked Station Standard**

60. Background. In the *Second Further Notice*, the Commission sought comment on whether we should entertain joint ownership of stations that (1) have very small audience or advertising market shares and (2) are located in a very large market where (3) a specified minimum number of independently owned voices remain post-merger. We stated that the purpose of such a standard would be to enhance competition and diversity in the local market by allowing small stations to share costs and thereby compete more effectively. We further stated that such joint ownership could potentially serve the public interest if such stations were to use their economic savings to produce new and better-quality programming or related enhancements. Such advantages may be particularly helpful to small and independent UHF stations. We invited comment on the circumstances under which joint ownership should be permitted, and on the size of the market share we might adopt, the number and kinds of voices we should count in any minimum voice criterion, and whether we should include a market rank test.

61. Comments. While broadcasters were generally supportive of the concept of same-market mergers, their comments on the specific criteria for them were mixed. ALTV is skeptical about reliance on market share standards. It notes that the Department of Justice already uses market share measures in its antitrust enforcement, and asserts that Commission duplication is unnecessary. ALTV also argues that market share measurement is complex and that its use could act as a disincentive to improve program

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<sup>107</sup> See *supra* note 34.

quality.<sup>108</sup> NAB, LSOC, and other broadcasters also oppose using a test based on market share.<sup>109</sup>

62. ALTV is also skeptical about reliance on "minimum number of voices" standards since the number of voices is lowest in the small markets that would, in their opinion, benefit most from local station combinations. Other broadcasters echoed this concern about prohibiting mergers in smaller markets.<sup>110</sup> If the Commission uses a "minimum number of voices" standard, ALTV advocates that the Commission count a variety of media as voices including radio, cable, MMDS, DBS, telephone company video platforms, newspapers, magazines, video cassette rentals, and other non-broadcast information sources such as the Internet.<sup>111</sup> LSOC and Pappas also advocate counting all media voices in the market, both broadcast and non-broadcast.<sup>112</sup>

63. BET is opposed to allowing mergers based on market share, market size, or the number of voices for the same reasons that it opposes the use of a failed station waiver, *i.e.*, that it will unfairly advantage incumbents against entrants, particularly minority entrants, and harm diversity.<sup>113</sup> MAP *et al.* argues that a small market share/minimum number of voices policy permits elimination of competitors serving niche needs. If mergers are granted under this criterion, MAP *et al.* asks that the Commission require a specific showing about what kinds of enhanced programming will result and ensure that these promises are met.<sup>114</sup>

64. Discussion. After considering the record, and our competition and diversity goals, we have decided to modify the duopoly rule to permit any two television stations in the same market to merge if:

- at least eight independently owned and operating full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located,<sup>115</sup> and

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<sup>108</sup> See ALTV Comments at 31.

<sup>109</sup> See NAB Comments at 12; LSOC Comments at 5-6; Paxson Comments at 14-19.

<sup>110</sup> See, *e.g.*, Granite Comments at 13-17.

<sup>111</sup> See ALTV Comments at 31.

<sup>112</sup> See LSOC Comments at 5-6; Pappas Comments at 7-9.

<sup>113</sup> See BET Comments at 5-6.

<sup>114</sup> See MAP *et al.* Comments at 21-24.

<sup>115</sup> Where there is no Nielsen DMA (e.g., Puerto Rico), parties may use data associated with a "functionally equivalent" TV market. Parties may demonstrate that a particular geographical area constitutes a functionally equivalent TV market based on viewing statistics or signal contour overlap.

- the two merging stations are not both among the top four-ranked stations in the market, as measured by audience share.<sup>116</sup>

If any entity acquires a duopoly under this standard, it will not later be required to divest if the number of operating television voices within the market falls below eight or if the two merged stations subsequently are both ranked among the top four stations in the market; however, a duopoly may not automatically be transferred to a new owner if the market does not satisfy the eight voice/top four-ranked standard. In such a case, the transaction must either meet one of the waiver standards enunciated below, or involve a sale to separate parties. We will not include a market rank component in our new rule because we believe such a test is unnecessary given the station rank and minimum number of stations criteria we are adopting. We adopt this "eight voice/top four-ranked station" standard as a modification of the rule as opposed to the adoption of a waiver criterion in order to fashion a bright-line test, bring certainty to the permissibility of these transactions, and expedite their consummation, given that we do not believe as a general matter that they unduly compromise our competition and diversity goals. We delegate to the Mass Media Bureau the authority to grant any application that satisfies the eight station/top four ranked station standard, and presents no new or novel issues.

65. This standard provides measured relaxation of the television duopoly rule, particularly in the larger television markets. It will allow weaker television stations in the market to combine, either with each other or with a larger station, thereby preserving and strengthening these stations and improving their ability to compete. These station combinations will allow licensees to take advantage of efficiencies and cost savings that can benefit the public, such as in allowing the stations to provide more local programming. At the same time, the station rank and voice criteria are designed to protect both our core competition and diversity concerns.

66. The "top four ranked station" component of this standard is designed to ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition. In addition, our analysis has indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved. Permitting mergers among these two categories of stations, but not among the top four-ranked stations, will consequently pose less concern over diversity of viewpoints in local news presentation, which is at the heart of our diversity goal. Indeed,

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<sup>116</sup> We are aware of some unusual situations involving two stations that are within, but at the periphery of, the same DMA, and which simulcast the same programming pursuant to an attributable LMA as a means of providing full coverage to the center market. In these cases, Nielsen apparently reports the share of the simulcasting stations together, making it impossible to determine whether both of the stations are ranked among the top four in their market. Because it is very unlikely that both stations in such an arrangement would be ranked among the top four stations were they rated separately, we will not require such stations, should they seek to merge, to demonstrate compliance with the top four ranking component of the eight-voice test of our new duopoly rule. Stations in these arrangements that seek to combine ownership under the voice-test component of the new rule will still be required, however, to establish that eight separately owned broadcast voices would remain in their market after their merger.

by allowing mergers between large and small stations, this prong of our new rule responds to those broadcasters who argued that the best way to improve the ability of small stations to compete is to allow them to combine with the largest stations in the market. According to these broadcasters, large stations are better positioned to provide the financial and other assistance required by many small stations to improve their technical facilities and programming to allow them to compete more effectively in the market.

67. The "eight independent voice" component of the rule provides a clear benchmark for ensuring a minimum amount of diversity in a market. The Commission has historically used voice count tests in other contexts (*i.e.*, in waiver standards for the radio-television cross-ownership rule) as a means of promoting diversity. Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity. Thus, under our new rule, at least eight independently owned and operating full-power commercial and noncommercial broadcast television stations must remain in the DMA post-merger. We will not include in our count of independently owned television stations those that are brokered pursuant to an attributable same-market LMA because a substantial portion of the programming of brokered stations is furnished by the brokering station.<sup>117</sup> This gives the brokering station a significant degree of influence over the brokered station's operations and programming such that it should not be counted as an independent source of viewpoint diversity; indeed, it is for this reason we have decided to attribute such TV LMAs in our attribution proceeding.<sup>118</sup>

68. We believe that an "eight station" test that focuses only on the number of full-power broadcast television outlets in the market is necessary for two reasons. First, we believe that broadcast television, more so than any other media, continues to have a special, pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans.<sup>119</sup> As the Supreme Court recently stated, "[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."<sup>120</sup>

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<sup>117</sup> Our decision that stations with attributable LMAs do not constitute independent separate voices applies equally to those we conclude to grandfather in Section VI below.

<sup>118</sup> Satellite stations will be included in our count, as they are full service stations, if they are separately owned, operated, and controlled (*i.e.*, the parent station is not in the same market and the satellite is not owned by an entity that holds another voice in the market).

<sup>119</sup> As noted above, close to 70 percent of Americans report that television is their primary source of news - almost twice the number that rely mainly on newspapers for information. *See supra* note 34.

<sup>120</sup> *Turner II*, 520 U.S. at 194 (1997). *See also Arkansas Educational Television Commission v. Forbes*, 118 S.Ct.1633, 1640 (1998) (noting that a majority of the population cites television as its primary source of election information).

69. Second, as described above,<sup>121</sup> we are unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television. In the *TV Ownership Further Notice* and *Second Further Notice*, we sought information about the extent to which other media serve as substitutes for television in the advertising and delivered video programming markets, and for purposes of diversity. For example, in the *TV Ownership Further Notice*, we stated that for the purpose of competition analysis, we would tentatively consider local advertising markets to include broadcast and cable television advertising, radio advertising, and newspaper advertising.<sup>122</sup> For delivered video programming, we tentatively included commercial and noncommercial television stations and cable television.<sup>123</sup> While we expressed our inclination to tentatively include MMDS, DBS, and television delivered by telephone companies, we expressed concern about the extent to which the latter three alternatives were actually available to most Americans and sought quantitative, behavioral studies estimating the extent to which broadcast television actually faced substitutes from any and all sources in the marketplace.<sup>124</sup> Although we have received voluminous materials debating such substitutability, we have not received the quantitative, empirical studies that we sought in order to assess this issue in a complete and accurate fashion. Nor does there seem to be a consensus on the extent to which various media are substitutes for purposes of diversity. Thus, while we agree with those commenters who argued that different types of media, such as radio, cable television, VCRs, MMDS, and newspapers, may to some extent be substitutes for broadcast television, in the absence of the factual data we requested we have decided to exercise due caution by employing a minimum station count that includes only broadcast television stations.

70. Our "eight voice/top four ranked station" standard provides significant relaxation of the television duopoly rule while at the same time ensures that markets remain sufficiently diverse and competitive at the local level so that common ownership of two television stations in these markets does not threaten our core diversity concerns. We recognize that stations in markets with less than nine independent voices will not be able to take advantage of this standard. But we believe this is appropriate given that these markets start with fewer broadcast television outlets, and thus a lower potential for providing robust diversity to viewers in such markets. While we recognize, as several commenters argued, that smaller markets also benefit from the efficiency gains and cost savings associated with joint station ownership, it is in these small markets that consolidation of broadcast television ownership could most undermine our competition and diversity goals. Moreover, the three waiver standards we adopt today -- the failed and failing station criteria, and the unbuilt station test -- will, consistent with our competition and diversity goals, provide relief in a more tailored fashion for stations in smaller markets that are unable to compete effectively.

## 2. Waiver Criteria

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<sup>121</sup> See *supra* ¶¶ 30-33.

<sup>122</sup> See *TV Ownership Further Notice*, 10 FCC Rcd at 3543.

<sup>123</sup> *Id.* at 3538.

<sup>124</sup> *Id.*

a. **Failed Stations**

71. Background. We invited comment in the *Second Further Notice* on whether, if an applicant can show that it is the only viable suitor for a failed station, the Commission should grant the application regardless of contour overlap or DMA designations. We noted that for purposes of our one-to-a-market rule waiver standard, a "failed" station is a station that has not been operated for a substantial period of time, *e.g.*, four months, or that is involved in bankruptcy proceedings. We asked whether this standard should be used in evaluating a request to waive the television duopoly rule.

72. Comments. There was considerable support among broadcasters for a failed station waiver. These commenters argued generally that some service, even if it is duplicative of another voice in the market, is better than no service at all.<sup>125</sup> In contrast, BET and MAP *et al.* opposed granting a failed station waiver on the ground it would hinder the ability of new entrants, particularly minorities and women, to enter the television industry, thereby diminishing opportunities to increase diversity of broadcast ownership.<sup>126</sup> BET advocated awarding failed station licenses to new entrants via auction or comparative hearing.<sup>127</sup>

73. Discussion. We are persuaded that the public interest would be served by adopting a failed station waiver standard for our revised television duopoly rule. A station that is off the air or in involuntary bankruptcy or insolvency proceedings can contribute little, if anything, to any type of diversity in a local market. Nor does such a station constitute a viable alternative in the local advertising market. As we concluded in adopting our current failed station waiver standard for the one-to-a-market rule, the benefits to the public of joint ownership under these circumstances outweigh the costs to diversity. In fact, dark or bankrupt stations actually disserve our goal of efficient use of the spectrum because those stations are holding valuable frequencies without providing service to the public.<sup>128</sup> Permitting another local station to acquire a failed station will result in additional programming, perhaps an increase in diversity in the market, and more advertising time available for sale in larger quantities.

74. Although we share the concern expressed by NTIA, MMTC, BET, MAP *et al.*, and AWRT about new entry into broadcasting, the apparent decline in minority and female ownership of broadcast facilities, and the need to encourage broadcast ownership diversity,<sup>129</sup> we are not convinced that that concern undermines our reasons for establishing a failed station waiver policy. We believe the benefit to the public of keeping a failed station on the air or returning a dark station to service is significant. We further note that the economies of scale that result from common ownership may in many circumstances

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<sup>125</sup> See, *e.g.*, Kentuckiana Comments at 3-4; Post-Newsweek Comments at 5-6; Shockley Comments at 4-5.

<sup>126</sup> See BET Comments at vii, 5; MAP *et al.* Comments at 17-18.

<sup>127</sup> See BET Comments at 5.

<sup>128</sup> See *Second Report and Order*, 4 FCC Rcd at 1753.

<sup>129</sup> See *supra* ¶¶ 13, 56, 63, 72.

be the only viable means of rejuvenating a failed station in an expeditious manner. Moreover, as discussed below, to qualify for the waiver, an applicant must demonstrate that the in-market buyer is the only reasonably available candidate willing and able to operate the station, and that selling the station to an out-of-market buyer would result in an artificially depressed price. To satisfy this element of the waiver standard, applicants will be required to give public notification that the station is for sale. Thus, minorities and women interested in purchasing a station will have an opportunity to bid. We remain very concerned about the more general problem of the decline in minority broadcast ownership and possible mechanisms to increase minority and female ownership in broadcasting,<sup>130</sup> but nonetheless believe our failed station waiver criteria serve the public interest. The Commission has made a number of efforts separate from this proceeding to address minority and female ownership issues, and we hope to take further steps in this area.<sup>131</sup>

75. We have decided to define a "failed station" for purposes of our television duopoly rule as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings. In addition, we will require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the failed station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.

76. This standard is stricter than the failed station standard used in the context of our current one-to-a-market rule.<sup>132</sup> First, we are limiting our TV duopoly failed station waiver to stations in court-supervised *involuntary* bankruptcy and insolvency proceedings. By excluding voluntary bankruptcy and insolvency proceedings, we hope to avoid the issue of whether an owner has filed for bankruptcy or insolvency simply in order to qualify for a waiver. We will extend our failed station waiver here to apply to both insolvency and bankruptcy proceedings, as the former are a state-regulated mechanism similar to bankruptcy. Second, we are requiring applicants to make a serious attempt to sell the troubled station to an entity that would not require a waiver of our revised duopoly rule. Waiver applicants must demonstrate

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<sup>130</sup> See *supra* ¶ 13.

<sup>131</sup> We are now guided in considering initiatives to encourage greater minority and female ownership in the mass media by the Supreme Court's 1995 decision in *Adarand*, 515 U.S. 200 (1995). We are presently conducting studies that will allow us to address this issue in the context of our broadcast licensing and ownership policies. In the meantime, we have adopted measures in other proceedings designed to promote ownership opportunities for small businesses, including those owned by women and minorities. For example, as part of our recently adopted competitive bidding procedures for commercial analog broadcast services, we have adopted a "new entrant" bidding credit designed to further the goals of the designated entity provisions of Section 309(j) of the Communications Act of 1934. See *Competitive Bidding First Report and Order*, 13 FCC Rcd at 15993-15996, ¶¶ 186-190. Section 309(j) directs the Commission, in implementing competitive bidding for broadcast licenses, to "... disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. . . ." 47 U.S.C. § 309(j)(3). The bidding credits adopted for broadcast licenses will be provided to entities that hold no or few mass media licenses.

<sup>132</sup> See 47 C.F.R. § 73.3555 Note 7; *Second Report and Order*, 4 FCC Rcd at 1752.

that the "in-market" buyer is the only reasonably available entity willing and able to operate the station, and that selling to another buyer would lead to an artificially depressed price for the station. One way to make this showing will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.<sup>133</sup> We believe that a strict failed station waiver standard is warranted in view of the other steps we are taking today to relax the television duopoly rule. While there are now other limited criteria pursuant to which same-market television stations may combine, we hope to limit the special relief awarded to failed stations to those situations where this relief is clearly needed. As with our current one-to-a-market failed station waiver standard, we will be predisposed to grant applications that meet the waiver standard, but will entertain petitions to deny seeking to rebut the waiver request.

77. To qualify for a waiver under the failed station standard, we will require the waiver applicant to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy or insolvency proceedings. We will also require, in the case of a silent station, a statement that the failed station went dark due to financial distress, not because of other, non-financial reasons. This documentation will ensure that the waiver standard is applied only to stations facing financial difficulties.<sup>134</sup> We will not require the waiver applicant to demonstrate that the market will contain post-merger a minimum number of voices. As noted above, we have concluded that the benefits to the public of preventing a station from going dark or bringing a dark station back on the air cannot harm and may help diversity and competition, regardless of the number of broadcast and other voices in the local market. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

#### b. "Failing" Stations

78. Background and Comments. The *Second Further Notice* also invited comment on whether we should adopt a failing station waiver criteria, and, if so, the appropriate definition of a failing station. Many broadcasters supported adopting a waiver policy for failing stations, contending that the Commission should not wait for a local station to go dark or bankrupt before permitting a merger.<sup>135</sup>

79. Discussion. We will adopt a "failing" station waiver standard. It will permit two stations to merge where at least one of the stations has been struggling for an extended period of time both in terms of its audience share and in its financial performance. Permitting such stations to merge should pose

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<sup>133</sup> However, we wish to emphasize that waiver applicants cannot satisfy the requirement to demonstrate that there is no out-of-market buyer without making a serious, good-faith effort to attempt to sell the station. In this regard, we will not accept a statement that there was no attempt to sell the station based on opinions of appraisers or brokers that the station would be unmarketable and thus that it would be futile even to advertise the station for sale.

<sup>134</sup> See *Spectrum Radio, Inc.*, 12 FCC Rcd 1667, 1671 (1997).

<sup>135</sup> See, *e.g.*, ALTV Comments at 30; LSOC Comments at 83-84; NAB Comments at 11-12.

minimal harm to our diversity and competition goals, since their financial situation typically hampers their ability to be a viable "voice" in the market. These stations rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all. Allowing a "failing" station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefitting the public interest. This waiver standard may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test.

80. We agree with the commenters that argued that it makes little sense to force a station to go dark or declare bankruptcy before considering whether it should receive a waiver of the duopoly rule to permit it to merge with another station in the market. Of course, determining when a station is "failed" is a more straightforward task, since there are clear, objective criteria for identifying such a status, *i.e.*, a station is dark or in bankruptcy. A "failing" station standard, by contrast, will involve more of an individualized, case-by-case assessment to determine when a station is struggling to such an extent that permitting it to merge with another station will not undermine our competition and diversity goals and may in fact promote them.

81. With these considerations in mind, and based on the record before us, we establish the following criteria for granting waivers under a "failing" station waiver standard. We will presume such a waiver is in the public interest if the applicant satisfies *each* of these criteria:

- (1) One of the merging stations has had low all-day audience share (*i.e.*, 4% or lower).
- (2) The financial condition of one of the merging stations is poor. A waiver is more likely to be granted where one or both of the stations has had a negative cash flow for the previous three years. The applicant will need to submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff will assess the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.
- (3) The merger will produce public interest benefits. A waiver will be granted where the applicant demonstrates that the tangible and verifiable public interest benefits of the merger outweigh any harm to competition and diversity. At the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.
- (4) The in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.

Any combination formed as a result of a failing station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

82. We believe these criteria provide a reasonable means of providing relief from our television duopoly rule consistent with our competition and diversity goals. If necessary we will tailor these criteria further as we gain experience in administering the "failing" station standard.

**c. Unbuilt Stations**

83. Background. In the *Second Further Notice*, we invited comment on whether we should entertain requests to waive the local television ownership rule to permit a local broadcast television licensee to apply for a television channel allotment that has remained vacant or unused for an extended period of time. We stated there that it may not be in the public interest to allow allotted broadcast channels to lie fallow -- particularly in markets where it might be possible to allow additional NTSC stations to come on the air without adversely affecting the DTV allotment table and the transition to digital television. Similarly, we asked whether, if it is possible to create new channel allotments in a market without interfering with nearby channels and without adversely affecting the DTV allotment table, the Commission should entertain applications by an incumbent television licensee to establish a new channel in its market.

84. Discussion. Since we adopted the *Second Further Notice*, the rationale for a vacant allotment waiver policy has become less relevant. In the *DTV Sixth Report and Order*, we eliminated vacant NTSC allotments in order to better achieve our DTV objectives of full accommodation, service replication and spectrum recovery.<sup>136</sup> We further stated that new television stations should be operated as DTV stations, and that there would be no need to maintain vacant NTSC allotments that were not the subject of a pending application or rule making proceeding.<sup>137</sup> Thus, with the licensing of new NTSC service coming to an end, we believe that the proposed rationale for a vacant allotment waiver policy has been largely vitiated because there would be few, if any, situations where that basis for a waiver would apply. As the development of DTV continues, it is possible that new channels may again become available for licensing. If so, we may reconsider this issue at that time or in the context of our biennial review of our multiple ownership rules.

85. Although we no longer find it appropriate to adopt a vacant allotment waiver standard, we have concluded that the public interest would be served at this time by adopting a duopoly waiver

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<sup>136</sup> *Sixth Report and Order* in MM Docket No. 87-268, *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997) at ¶ 112.

<sup>137</sup> *Id.* We stated that we would treat existing vacant allotments that are not the subject of pending NTSC proposals as deleted. In the *DTV Sixth Further Notice*, we established July 25, 1996 as the last opportunity to file petitions to add channels to the TV Table of Allotments, and we provided that we would not accept additional applications for new NTSC stations (other than applications responding to cutoff lists) after 30 days from the publication of that *Notice* (September 20, 1996). *Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 11 FCC Rcd 10968 (1996).

standard for "unbuilt" television stations. The unbuilt station waiver we adopt is premised on essentially the same logic as supports our failed and failing station waiver standards. A station that has gone unbuilt, like a built station that has gone dark, cannot contribute to diversity or competition. On the other hand, activation of a construction permit and construction of a station, even by the owner of another television station in the market if that is the only viable means to obtain service, increases program choice for viewers, may increase outlet diversity, and increases the amount of advertising time available for sale in the market. We believe that the benefits to the public of construction and operation of such a station, even if through joint ownership, rather than allowing the channel to remain unused, outweigh any costs to diversity and competition.

86. To qualify for a duopoly waiver under this standard, we will require that applicants satisfy each of these criteria:

- (1) The combination will result in the construction of an authorized but as yet unbuilt station.
- (2) The permittee has made reasonable efforts to construct, and has been unable to do so.
- (3) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station and selling the construction permit to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed and failing station waiver applicants, one way to satisfy this criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received.

Any combination formed as a result of an unbuilt station waiver may be transferred together only if the combination meets our new duopoly rule or one of our three waiver standards at the time of transfer.

87. We believe our criteria for unbuilt station waivers will ensure that they will only be available in situations in which allowing purchase by an in-market buyer is consistent with our competition and diversity goals. If necessary we will tailor these criteria further as we gain experience in administering this standard.

#### d. UHF Combinations

88. Background and Comments. In the *Second Further Notice*, we invited comment on the extent to which the Commission should distinguish between UHF and VHF stations in applying our TV duopoly rule. A number of parties have argued that the Commission should adopt a UHF exception or waiver policy for the duopoly rule. Many broadcaster commenters in this proceeding advocated permitting UHF combinations, either by rule or waiver.<sup>138</sup> Other commenters disagreed, arguing that the historical

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<sup>138</sup> These commenters generally argued that UHF stations are at a disadvantage as compared to VHF stations because of their weaker signal strength and greater costs of operation. See, e.g., Jet Comments at 4-5; ALTV Comments at 24-29; Granite Comments at 3-5. They also argued generally that permitting UHF/UHF or

disadvantage of UHF stations has diminished, in part as a result of increased cable penetration and the increased competition for affiliates among major and emerging networks.<sup>139</sup> They also pointed out that the implementation of DTV may substantially mitigate, if not entirely eliminate, the technical handicap of UHF stations.<sup>140</sup>

89. After careful consideration of the comments, we have decided not to create a UHF exception or UHF waiver policy for several reasons. First, a UHF exemption or waiver policy is an overbroad means of promoting the public interest. As we noted in our *Report and Order* eliminating the prime time access rule for television networks, many UHF stations are financially successful, are network affiliates, and are part of large station groups.<sup>141</sup> Thus, a blanket exception or waiver for all UHF stations would unfairly benefit more powerful affiliates as well as struggling stations. Second, cable carriage compensates for many of the technical disadvantages faced by UHF stations vis-a-vis their VHF counterparts. Cable penetration is near 70 percent nationwide. Moreover, the Supreme Court's decision upholding the statutory must-carry rights of television stations removes a major source of uncertainty among UHF stations about their ability to obtain cable carriage.<sup>142</sup> Third, deployment of DTV should eliminate, over the next several years, many of the remaining disadvantages of UHF stations. The Commission's power limitations for DTV licensees will likely reduce the technical discrepancy of UHF and VHF stations, and the multichannel capabilities of digital transmission should enhance the ability of UHF stations to compete in the video marketplace. Fourth, licensees may continue to take advantage of the satellite station exception to the TV duopoly rule, which is designed to assist financially struggling stations that cannot operate as stand-alone full-service stations. Finally, we believe that the financial problems faced by particular UHF stations can more appropriately be addressed, at least to some extent, by the other duopoly waiver criteria we are adopting today. As discussed above, these criteria are targeted to assist stations facing financial hardships. We therefore will not create a waiver policy or exception to the TV duopoly rule based on whether a station is in the UHF or VHF band.<sup>143</sup>

### 3. Satellite Stations

UHF/VHF combinations would permit the weaker station to become a more viable competitor, thus increasing competition and diversity in the market. See, e.g., Granite Comments at 6-7; HSN Comments at 9-12.

<sup>139</sup> See, e.g., Kentuckiana Comments at 5; Post-Newsweek Comments at 4-5, MAP *et al.* Comments at 12-15. Kentuckiana notes that in many markets there is no UHF disadvantage since most or all local stations are UHF.

<sup>140</sup> See DOJ Comments at 20, n. 25; NTIA Comments at 7.

<sup>141</sup> See *Report and Order, Review of the Prime Time Access Rule*, MM Docket No. 94-123, 11 FCC Rcd 546, 595-596 (1995).

<sup>142</sup> *Turner II*, 520 U.S. at 185.

<sup>143</sup> In addition, we note that the issue of whether UHF stations should continue to retain a "discount" for purposes of our national ownership rules is under consideration in our pending biennial review. See *Biennial Review NOI*, 13 FCC Rcd at 11284-11285, ¶¶ 25-27.

90. Background. Generally, television satellite stations retransmit all or a substantial part of the programming of a commonly-owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. In the *Second Further Notice*, we noted that the Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations.<sup>144</sup> Later we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks. More recently, we have authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.<sup>145</sup> We stated in the *Second Further Notice* that we saw no reason to alter our policy of exempting satellite stations from our local ownership rules, but invited comment on this conclusion. All the commenters that addressed this issue supported continuing the exception of satellite stations from the duopoly rule.<sup>146</sup>

91. Discussion. We believe that continued exception of satellite stations from the duopoly rule is appropriate. As we stated in the *Second Further Notice*, our satellite station policy rests in part on the questionable financial viability of the satellite as a stand-alone facility.<sup>147</sup> As such, our policy has furthered the underlying goals of our ownership restrictions by adding additional stations to local television markets where these stations otherwise would not have been established. In addition, the other criteria we use to evaluate satellite operations, including service to underserved areas, ensure that satellite operations are consistent with our goals of promoting diversity and competition.

## V. RADIO-TELEVISION CROSS-OWNERSHIP RULE

92. Background. The radio-television cross-ownership rule, or the "one-to-a-market" rule, forbids joint ownership of a radio and a television station serving substantial areas in common.<sup>148</sup> In 1989, the Commission amended the rule to permit, on the basis of a presumptive waiver, radio-television mergers involving one television and one AM and one FM station, in the Top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain in the relevant market, or if the

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<sup>144</sup> See *Second Further Notice*, 11 FCC Rcd at 671, ¶ 36.

<sup>145</sup> See *Report and Order, Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petition for reconsideration pending) ("*TV Satellite Stations Report and Order*").

<sup>146</sup> See ABC Comments at 5; Malrite Comments at 22; Paxson Comments at 13; SCC Comments at 3.

<sup>147</sup> To qualify for television satellite status, the applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. This criteria is strong evidence that a stand-alone facility is not viable. The other criteria for satellite status are (1) no City Grade overlap between the parent and the satellite, and (2) the proposed satellite would provide service to an underserved area. See *TV Satellite Stations Report and Order*, 6 FCC Rcd at 4212.

<sup>148</sup> As noted earlier, the one-to-a-market rule is triggered by encompassment of one station's city of license by a specified service contour of the other station, not by simple overlap of contours. In most cases, this will mean that the stations are fairly close to one another.

merger involves a failed station. Our current policy also permits waivers on a case-by-case basis if the merger satisfies a group of five separate criteria.<sup>149</sup>

93. In the *TV Ownership Further Notice*, we proposed to eliminate the cross-ownership restriction in its entirety or replace it with an approach under which cross-ownership would be permitted where a minimum number of post-acquisition, independently owned broadcast voices remained in the relevant market. We tentatively concluded there were two alternative approaches toward modifying the rule. If radio and television stations do not compete in the same local advertising, program delivery, or diversity markets, we proposed to eliminate the rule entirely and rely on our radio and television local ownership rules to ensure competition and diversity at the local level. Under the local radio ownership rules in effect at that time, this would have permitted entities to own one AM, one FM, and one television station in even the smallest markets, and up to 2 AM, 2 FM, and one television station in larger markets. In contrast, if we concluded that radio and television did compete in some or all of the local markets, we proposed to modify the one-to-a-market rule to permit radio-television combinations in markets where there are a sufficient number of remaining independent voices to ensure sufficient diversity and competition.

94. After adoption of the *Further Notice*, Congress passed the 1996 Act, which affects the radio-television cross-ownership rule in at least two ways. First, Section 202(d) of the Act directs the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50, rather than top 25, television markets "consistent with the public interest, convenience and necessity." Second, Section 202(b)(1) of the Act liberalized the local radio ownership rules. Now, a party may own up to 8 commercial radio stations, not more than five of which are in the same service (AM or FM), in radio markets with 45 or more commercial radio stations, up to 7 commercial radio stations, not more than 4 of which are in the same service, in radio markets with 30-44 commercial radio stations, and up to 6 commercial radio stations, not more than 4 of which are in the same service, in radio markets with 15-29 commercial radio stations. In radio markets with 14 or fewer commercial radio stations, one party can own up to 5 commercial radio stations, not more than 3 of which are in the same service, provided that no party may own, operate or control more than 50% of the stations in the market.

95. In our *Second Further Notice*, based on the statutory changes to the local radio ownership rules, we requested further comment on our radio-television cross-ownership rule proposals. First, we sought further comment on whether the rule should be eliminated based on a finding that radio and television stations do not compete in the same market. Second, even if we consider television and radio stations to be competitors, we asked if the radio-television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone can be relied upon to ensure sufficient diversity and competition in the local market. We also sought to update the record on a number of specific options for modifying, but not eliminating, the rule. In this regard, and consistent with Section

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<sup>149</sup> These criteria include the potential public service benefits of joint operation of the facilities involved in the merger, the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the post-merger market in light of our diversity and competition concerns. See *Second Report and Order*, 4 FCC Rcd at 1753 (1989). Not all five criteria must be met under the current waiver test.

202(d) of the 1996 Act, we proposed, at a minimum, to extend the Top 25 market/30 voice waiver policy to the Top 50 markets. However, we also invited comment on a number of options to change the rule beyond what was contemplated by Section 202(d) of the 1996 Act. For example, we asked whether the presumptive waiver policy should be extended further to any television market where the minimum number of independent voices would remain after the merger. We also invited comment on whether the presumptive waiver policy should be extended to entities that seek to own more than one FM and/or AM radio station, and whether the Commission should reduce the number of required independently owned voices that must remain after a merger. Finally, we asked whether our "five factors" test should be changed or refined to be more effective in protecting competition and diversity.

96. Comments. The commenting broadcasters, with a few exceptions, favored elimination of the one-to-a-market rule or, failing that, substantial relaxation of the rule. These broadcasters generally pointed to the large number of media, both broadcast and non-broadcast, that compete with radio and television in the local market as evidence that elimination of the rule would not adversely affect competition and diversity.<sup>150</sup> They also argued that allowing radio/television combinations leads to cost savings that enhance the ability of broadcasters to compete with their multichannel video competitors, and permits investment in better quality programming and facilities that improve service to the public. In addition, some broadcasters argued that in circumstances where concerns about competition exist, the Department of Justice should exercise jurisdiction to stem abuses, rather than the FCC.<sup>151</sup>

97. Public interest groups, joined by a few broadcasters, advocated that the one-to-a-market rule be retained. These parties argued generally that the rule is necessary to retain diversity and competition in the local market and to prevent an increase in the barriers to entry into broadcast ownership faced by minorities, women, and small businesses. Black Citizens for a Fair Media, joined in its comments by thirteen other public interest groups (BCFM *et al.*), argued that the local radio and television ownership rules alone cannot be relied upon to ensure diversity and competition in the local market, and that the radio-television cross-ownership rule is more important now to protect diversity as a result of the 1996 Act's relaxation of the radio and television ownership limits and the consolidation in the industry that has followed.<sup>152</sup> AWRP, BET, and MAP *et al.* urged the Commission to proceed cautiously in any effort to relax its ownership rules and to evaluate fully the increasing concentration of control in mass

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<sup>150</sup> See, e.g., NAB Comments at 13-15; CBS Comments at 13, 18.

<sup>151</sup> See Paxson Comments at 20.

<sup>152</sup> See BCFM Comments at 2-4. BCFM filed its comments jointly with the Center for Media Education, Chinese for Affirmative Action, Communications Task Force, League of United Latin American Citizens, Minority Media Telecommunications Council, National Association for Better Broadcasting, NOW Legal Defense and Education Fund, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press.

media ownership.<sup>153</sup>

98. With respect to the Commission's specific proposals for modifying, but not eliminating, the one-to-a-market rule, most broadcasters supported extending the presumptive waiver policy to all markets that satisfy a minimum independent voice test. Although broadcasters generally believed there is no reason to retain the one-to-a-market rule, if the rule is retained they argue that the thirty-voice presumptive waiver policy should be extended to apply to all markets regardless of market rank.<sup>154</sup> In addition, most broadcasters supported extending the presumptive waiver policy to permit entities to own the maximum number of stations permitted by the separate radio and television ownership limits.<sup>155</sup> Several commenters pointed out that television owners are now treated less favorably than radio owners for no rational reason in that a radio owner may own multiple stations up to the maximum allowed by the radio limits, while a television owner may own only one AM and one FM station in the same market, where 30 independent voices remain post-merger, without making a showing under the current five factors test. In the absence of a finding that the latter combination threatens local-market competition and diversity more than the former, these commenters argued the difference in treatment is unjustifiable.<sup>156</sup> Many broadcasters also supported reducing the minimum number of independent voices that must remain after a merger under the presumptive waiver policy and expanding the list of media counted as voices.<sup>157</sup>

99. Public interest groups, joined by a few broadcasters, generally opposed relaxing the one-to-a-market rule further than directed by Congress, citing the same diversity and competition concerns they raised in opposing elimination of the rule. BCFM also opposed expanding the definition of independently-owned voices to include media forms that are not yet widely available and do not carry local news and

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<sup>153</sup> See BET Comments at i; AWRP Comments at 1-2; MAP Comments at 2. BET argues that minority-owned businesses hold only 3% of all television licenses, and that empirical studies have demonstrated a strong correlation between ownership by minority businesses and diversity of programming. BET Comments at viii.

<sup>154</sup> See, e.g., ABC Comments at 9-10; Pappas Comments at 15; SCC Comments at 6; Sinclair Comments at 12-13.

<sup>155</sup> See, e.g., ABC Comments at 12-13; CBS Comments at 26; Jacor Comments at 11-12; Pappas Comments at 17; Paxson Comments at 22; Sinclair Comments at 12-13; SCC Comments at 6.

<sup>156</sup> See, e.g., ABC Comments at 10.

<sup>157</sup> See, e.g., Paxson Comments at 237 (require 20, rather than 30, independent voices under a minimum voices test and include in the independent voice analysis commercial and noncommercial radio and television stations, daily newspapers, cable television systems, and MMDS systems); CBS Comments at 28 (reduce number of voices to 20); Jacor Comments at i, 8-9 (15 voices "more than adequate" to preserve diversity and prevent accumulation of power in the local advertising market; in applying a voice test, at a minimum count all radio stations licensed or with a significant penetration within the market and every cable operator, DTH provider, and Internet provider); ABC Comments at 11 (in applying a 30 voices test, count all independently-owned daily and weekly newspapers, television stations, radio stations, and cable channels that have the capacity to act as local outlets in the market).

public affairs programming.<sup>158</sup>

#### A. Modification of the Rule

100. Discussion. We have determined that the public interest would be best served at this time by relaxing the radio-television cross-ownership rule to permit same-market joint ownership of radio and television facilities up to a level that permits broadcasters and the public to realize the benefits of common ownership while not undermining our competition and diversity concerns. Our new rule consists of three parts. First, we will permit a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 20 independently owned media voices remain in the market after the combination is effected. In those markets where our revised rule will allow parties to own a total of eight outlets in the form of two TV stations and six radio stations, we will also permit them instead to own eight outlets in the form of one TV station and seven radio stations. Second, we will permit common ownership of up to two television stations and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independently owned media voices remain after the combination is effected. And, third, we will permit common ownership of up to two television stations and one radio station notwithstanding the number of independent voices in the market. In determining which stations are subject to the new rule, we will use the same contour overlap standards used in our present rule.<sup>159</sup> We delegate to the Mass Media Bureau the authority to grant any application that satisfies the new radio/TV cross-ownership rule, and presents no new or novel issues. If a voice test is required to acquire a given combination (*i.e.*, any combination that includes more than one radio/TV combination), that combination will not later be required to be undone if the number of independent voices in the market later falls below the applicable voice test. However, a radio/TV combination may not be transferred to a new owner if the market does not satisfy the applicable voice standard at the time of sale.

101. As described below, we will eliminate our five factor case-by-case waiver standard. Waivers of our new three-part rule will be granted only in situations involving a failed station and in

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<sup>158</sup> BCFM Comments at 2-4.

<sup>159</sup> The current one-to-a-market rule, and the rule we adopt today, is triggered by the degree of contour overlap among the stations involved. In particular, the rule is triggered where the predicted or measured 2 mV/m contour of the AM station encompasses the entire community of license of the television station, or the Grade A contour of the television station encompasses the entire community of license of the AM station. With respect to FM stations, the relevant contour is the predicted 1 mV/m contour. See 47 C.F.R. § 73.3555(c)(1) & (2). The contour overlap standards determine which stations or transactions are subject to the radio-television cross-ownership rule. If application of the contour overlap standards indicates the transaction is subject to the rule, the focus shifts to the three prongs of the new rule to determine what level of ownership is permitted.

extraordinary circumstances in which the proponent of the waiver will face a high hurdle.<sup>160</sup> We will define a failed station for purposes of our new radio/TV cross-ownership rule in the same manner as that term is defined for purposes of the failed station waiver we adopt today in connection with our television duopoly rule. Any combination formed as a result of a failed station waiver may be transferred together only if the combination meets our new radio/TV cross-ownership rule or our failed station waiver standard at the time of transfer.

102. Rationale for Modified Rule. We relax our radio/TV cross-ownership rule to balance our traditional diversity and competition concerns with our desire to permit broadcasters and the public to realize the benefits of radio-television common ownership. We believe that the revised rule reflects the changes in the local broadcast media marketplace. The relaxed rule recognizes the growth in the number and types of media outlets, the clustering of cable systems in major population centers, the efficiencies inherent in joint ownership and operation of both television and radio stations in the same market, as well as the public service benefits that can be obtained from joint operation. At the same time, the voice test components of the revised rule also ensure that the local market remains sufficiently diverse and competitive.

103. The new three-part rule also ensures the application of a clear, reasoned standard. One of our primary goals in this proceeding is to provide concrete guidance to applicants and the public about the permissibility of proposed transactions. This minimizes the burdens involved in complying with and enforcing our rules. It also promotes greater consistency in our decision-making. Since development of the Commission's waiver policy in 1989, the Commission has granted a significant number of waivers in order to provide broadcasters relief from the one-to-a-market rule, which prohibited any common ownership of television and radio stations in the same market. Indeed, some commenters argue that this waiver process has come to govern regulation of same-market radio-television cross-ownership, rather than the rule itself.<sup>161</sup> Today, we redirect our approach by amending the rule to provide a greater degree of common ownership of radio and television stations while at the same time limiting waivers of this new rule to only extraordinary circumstances. In addition, the new rule will ease administrative burdens and will provide predictability to broadcasters in structuring their business transactions.

104. A number of commenters argued that we should eliminate our radio-television cross-ownership rule entirely. We do not believe that course is appropriate at this time. We stated in the *TV Ownership Further Notice* that elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets. Although radio and television stations may or may not compete in different advertising markets,<sup>162</sup> we believe a radio-television cross-ownership rule continues to be necessary to promote a diversity of

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<sup>160</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969, cert. denied, 409 U.S. 1027 (1972)) (noting that agency rules are presumed valid, and that "an applicant for waiver faces a high hurdle even at the starting gate").

<sup>161</sup> See, e.g., Spectrum Detroit Comments at 12 - 15.

<sup>162</sup> See *supra* ¶¶ 31-33.

viewpoints in the broadcast media. The public continues to rely on both radio and television for news and information, suggesting the two media both contribute to the "marketplace of ideas" and compete in the same diversity market. As these two media do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-market rule to ensure that viewpoint diversity is adequately protected.

105. Although we decline to eliminate our radio-television cross-ownership rule, the demonstrated benefits of same-market broadcast combinations support relaxing the rule and allowing such combinations in circumstances where we find that diversity and competition remain adequately protected. The record in this proceeding demonstrates that there are significant efficiencies inherent in joint ownership and operation of broadcast stations in the same market, even when the stations are in separate services (*i.e.*, radio-TV combinations).<sup>163</sup> Among other benefits, these efficiencies often lead to improved programming and can help stations in financial difficulty remain on the air. The revised radio/TV cross-ownership rule we adopt today will establish clear guidelines that will permit common ownership of radio and television stations in markets where diversity and competition are preserved.

106. We will monitor the impact on the broadcast industry of this and other changes to our ownership rules being made today, as well as the changes to the television industry associated with the conversion to digital television and the increase in the number of media outlets available to the public. In light of these observations, we will have a further opportunity to consider relaxing the radio/TV cross-ownership rule as we evaluate ongoing changes in the television and radio markets in conjunction with future biennial reviews.

107. Turning to the specifics of the first two prongs of the new rule, we will use a "voice count" approach rather than also applying a market rank restriction as with our current top 25 market, 30 voice presumptive waiver policy. In particular, the first prong of our new rule, which permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least twenty independently owned media voices, focuses on the number of independent voices remaining in the market post-merger, rather than market rank (*e.g.*, the top 100 markets). A rule based on the number of independent voices more accurately reflects the actual level of diversity and competition in the market. As a number of commenters in this proceeding noted, a market-size restriction is unnecessary for purposes of competition and diversity as long as there are a minimum number of independent sources of news and information available to listeners, and a minimum number of alternative outlets available to advertisers.<sup>164</sup> Two broadcasters specifically urged us to allow TV/radio combinations as a matter of course in any market that satisfies a minimum independent voice test.<sup>165</sup> In addition, unlike a rule based on market rank, our revised rule will account for changes in the number of voices in a market resulting from consolidation, the

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<sup>163</sup> See *supra* ¶¶ 34-36.

<sup>164</sup> See, *e.g.*, Paxson Comments at 23 - 24; Pappas Comments at 15-16.

<sup>165</sup> See CBS Comments at 26; Jacor Comments at 7.

addition of new voices, or the loss of any outlets. Mergers will be permitted only when the voice count is satisfied, thereby ensuring the preservation of a minimum level of diversity and competition in the market.

108. In markets where the voice count component of our revised duopoly and radio/TV cross-ownership rule would allow parties to own two TV stations and six radio stations, for a total of eight outlets, we will also permit parties to own the same total number of outlets in the form of one TV station and seven radio stations. As we have explained above, broadcast television is the single most important source of news for the majority of Americans. We therefore believe that, in markets where there is sufficient competition and diversity to justify combinations involving two *television* stations and six radio stations, broadcasters should have the flexibility to purchase an additional *radio* station instead of a second television station.

109. The second prong of our new rule permits a party to own up to two television stations (provided this is permitted under our modified TV duopoly rule or TV LMA grandfathering policy) and up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market with at least ten independently owned media voices. This standard also focuses on the number of independent voices remaining in the market post-merger rather than market rank, and extends the benefits of common ownership to smaller markets. In this regard, our revised rule permits broadcasters and the public in these markets to realize the same benefits of common ownership we have concluded are worthwhile for the largest markets.

110. The third prong of our new rule will allow common ownership of up to two television stations (provided that is permissible under our rules or TV LMA grandfathering policy) and one radio station notwithstanding the number of independent voices in the market. Based on the record before us, we find that the service benefits and efficiencies achieved from the joint ownership and operation of a television/radio combination in local markets further the public interest and outweigh the cost to diversity in these instances.<sup>166</sup>

111. Applying the Voice Count Tests. We will apply the voice test under both prongs of our new radio/TV cross-ownership rule that include such a test as follows:

- (1) We will count all independently owned and operating full-power commercial and noncommercial broadcast television stations licensed to a community in the DMA in

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<sup>166</sup> As noted above, Section 202(d) of the 1996 Act directed the Commission to "extend its [one-to-a-market top 25/30 voice] waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity." Given that we find that the public interest will be served by permitting at least one TV station (or two, if permitted by our new TV duopoly rule) to combine with one radio station in every market, regardless of market rank or voice counts, we believe that our new waiver policies satisfy Section 202(d) requirements. Indeed, staff analysis suggests that all of the top fifty markets have at least twenty voices, such that at least one combination of two TV stations and six radio stations would be permitted in these markets.

which the community of license of the television station in question is located.<sup>167</sup>

- (2) We will also count all independently owned and operating commercial and noncommercial broadcast radio stations licensed to a community within the radio metro market in which the community of license of the television station in question is located.<sup>168</sup> In addition, we will count broadcast radio stations outside the radio metro market that Arbitron or another nationally-recognized audience rating service lists as having a reportable share in the metro market.<sup>169</sup> In areas in which there is no radio metro market, the party seeking the waiver may count the radio stations present in an area that would be the functional equivalent<sup>170</sup> of a radio market.
- (3) We will count all independently owned daily newspapers that are published in the DMA

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<sup>167</sup> We will not include in our count of voices broadcast stations that are programmed by other stations in the market pursuant to attributable local marketing or time brokerage agreements. A substantial portion of the programming of these "time brokered" or "LMAed" stations is furnished by the brokering station and cannot be deemed an independent source of viewpoint diversity; indeed, such brokering constitutes an ownership interest under our attribution rules. See *Attribution Report and Order*, section III.C.

<sup>168</sup> A radio market, as delineated by Arbitron, generally reflects the geographic area in which a cluster of radio stations serves a population that advertisers seek to reach. Arbitron radio markets generally correspond to Metropolitan Statistical Areas as defined by the U.S. Government Office of Management and Budget ("OMB"). See Bureau of the Census, *Geographic Areas Reference Manual*, November 1994, Chapter 13, pp. 1-13. Arbitron has delineated 268 radio metro markets throughout the U.S.

<sup>169</sup> For purposes of counting the broadcast licensees in the market, we will include only primary authorizations. Thus, we will not include low power stations, translators, or class D FM stations. We will also exclude from our count any non-operational or dark stations. We will count, however, any on-air stations operating under a construction permit. This is consistent with the method used to count independent voices for purposes of our current top 25 market/30 voices presumptive waiver standard. Satellite stations will be included in our count, as they are full service stations, if they are separately owned, operated, and controlled (*i.e.*, the parent station is not in the same market and the satellite is not owned by an entity that holds another voice in the market).

<sup>170</sup> We believe that, in most cases, the radio voice count will be based on Arbitron radio markets. Approximately 56 percent of all commercial radio stations are located within Arbitron's 268 radio markets. Where there is no recognized Arbitron radio metro market, parties may use data associated with a "functionally equivalent" radio market. Parties may demonstrate that a geographical area such as a county or group of contiguous counties constitute a functionally equivalent radio market based on the listening statistics of the populace in the counties that make up that geographical area. Parties may also demonstrate a functionally equivalent radio market based on signal contour overlap. For purposes of demonstrating a functionally equivalent market based on signal contour overlap, we will look at contours (2 mV/m for AM stations or 1 mV/m for FM stations) that encompass the community of license of the TV station in question.

at issue and that have a circulation exceeding 5% of the households in the DMA.<sup>171</sup>

- (4) We will count cable systems provided cable service is generally available to television households in the DMA. For DMAs in which cable service is generally available, cable will count as a single voice for purposes of our voice analysis, regardless of the number of cable systems within the DMA, their ownership, and any overlap in service area.

112. In counting broadcast television and radio stations as "voices" we are being consistent with the voice count analysis used in our current "top 25 market/30 voice" presumptive waiver standard. That standard, however, counts radio stations licensed to the relevant *television* metropolitan market.<sup>172</sup> Under our new rule, we will instead use the *radio* metropolitan market, and will include both radio stations licensed within the radio metro market and stations with a reportable share in that market.<sup>173</sup> We believe it is important to count radio stations with a reportable share in the relevant market because those stations clearly serve as a source of information and entertainment programming for the relevant market. We have chosen to use the radio metro market rather than the television metro market for counting the number of independent radio voices because the former more accurately reflect the competitive and core signal availability realities for radio service in the market. All independently owned radio stations in the radio market can be presumed to be available to residents of that market because of signal reach.<sup>174</sup> Radio stations outside the radio metro market may also be presumed to be available to all residents of the radio

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<sup>171</sup> Consistent with the newspaper/broadcast cross-ownership rule, to be considered "daily" a newspaper must be published four or more days per week and in the English language. See 47 C.F.R. § 73.3555(d), Note 6.

<sup>172</sup> 47 C.F.R. Section 37.3555 Note 7; *Second Report and Order*, 4 FCC Rcd at 1751. For purposes of applying our current "top 25 market/30 voice" presumptive waiver, we count full-power commercial and noncommercial television stations licensed to the relevant ADI television market as well as operating AM and FM radio stations licensed to the relevant TV metropolitan market. See *Second Report and Order*, 4 FCC Rcd at 1751.

<sup>173</sup> Many DMAs have more than one Arbitron metro radio market located within them. To qualify under our twenty voice count criterion, where a merger involves stations in different radio markets, the voice requirement must be met in each of those radio metro markets. For example, assume television station A and radio station B (in the same DMA) wish to merge, where station A is in radio metro market C and station B is in radio metro market D. In order to be approved under this waiver standard, the voice count requirement must be satisfied in *each* of the radio metro markets, C and D. Thus, the radio metro market with the fewer voices would control.

<sup>174</sup> Arbitron has delineated 268 different local geographic areas, or metros, to reflect the audiences reached by local radio stations. This delineation of a local radio market has value for buyers and sellers of radio advertising. Arbitron metros generally correspond to Metropolitan Statistical Areas as defined by OMB. Generally, a Metropolitan Statistical Area consists of one or more counties that contain a city of 50,000 or more inhabitants, or contain a Census Bureau-defined urbanized area with a total population of at least 100,000. About 56 percent of all commercial stations are licensed to communities in the 268 markets. The 268 radio markets consist of a total of about 800 counties representing about 25 percent of all counties in the U.S. More than three-fourths of the U.S. population of at least 12 years of age reside in the 268 radio markets.